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Supreme Court, U.S.
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No. 02-534

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
JEFFREY SCOTT CLAUSEN,

Petitioner,

v.

LABORATORY CORPORATION OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF

In opposition, LabCorp mistakenly celebrates the fact that there is a national trend of courts applying Rule 9(b) to False Claims Act ("FCA") cases, stating that six circuits (and district courts as well) have expressly applied Rule 9(b) to FCA cases. Opp. 2, 6. LabCorp states that the application of Rule 9(b) is now "routine". *Id.* at 3. However, when the national trend and the routine are legally wrong and undermine the plain meaning of the Rules and the statutory language and intent of Congress, it is precisely then that the Court should grant certiorari. *See* Pet. at 18-24. Indeed, it seems that one ruling with broad national impact, which would correct at least six erroneous decisions, is more worthwhile than a decision that concerns only two opinions that happen to be in conflict.

Moreover, LabCorp's response completely overlooks (and leaves uncontested) four main points for granting certiorari:

1. The *Clausen* decision admittedly "'makes it hard for many persons to bring a *qui tam* suit'" in direct contravention of Congress' purpose in enacting the 1986 amendments. App. at 15 (quoting *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); *see* discussion in Pet. at 6-10; *see also* Opp. at 11 (the purpose of the amendments was to encourage potential whistleblowers to come forward). In enacting the 1986 amendments, Congress sought to free the FCA from the shackles of restrictive court interpretations, which kept potential whistleblowers from coming forward. S. Rep. No. 99-345, 99th Cong., 2d Sess. 1, 4, reprinted in 1986 U.S.C.C.A.N. 5266, 5269 (hereinafter "S. Rep."). Because the *Clausen* decision restricts the FCA and sends potential whistleblowers back to the shadows of silence, it is worthy of this Court's attention and correction. Pet. at 6-10. The FCA is a national law of national importance. *Id.* at 7. Unfettered, taxpayers have reaped benefits by recuperating billions of dollars of misused taxpayer monies. *Id.*; *see also The 1986*

False Claims Act Amendments: An Assessment of Economic Impact, 7 FALSE CLAIMS ACT AND QUI TAM QUARTERLY REVIEW 28 (1996) (hereinafter "FCA QUARTERLY REVIEW") (deterrent effect estimated at $300 billion for first 10 years). Refettered, taxpayers stand to lose tens or hundreds of billions of dollars a year. S. Rep. at 3.

The potentially devastating impact of the *Clausen* decision can be shown by retroactively applying it to FCA complaints resulting in historically large settlements. *Clausen* would likely have wiped out most of the largest settlements on record as "frivolous" for failing to plead all the elements with exactness. *See* Pet. at 11-15. For example, the largest settlement to date involved Columbia/HCA and the payment of $745 million. Trisha Renaud, *Medicare Fraud Tipster to Get $25 Million*, FULTON COUNTY DAILY REPORT, Feb. 22, 2001, at 1. There were over 30 cases filed against Columbia/HCA that were consolidated in multidistrict litigation. *Id.* Not one of the 30 relator complaints would have passed *Clausen*'s heightened pleading standard. Not one includes the exact date, amount, invoice number, or specific employee who submitted the bill ("the sine qua non of an FCA violation").[1] App. at 22; *see id.* at 24 (requiring statements, "with particularity, [of a] false claim actually being submitted to the government"). Indeed, not one complaint was pled with anywhere near the amount of detail provided in the complaint in this case. *See* Pet. at 3-4, 15.

A case filed against Chevron, BP Amoco, Texaco and others resulted in some of the largest settlements in 2000. *Top Qui Tam Recoveries for the Year 2000,* 21 FCA QUARTERLY REVIEW 20-21 (2001) (over $170 million combined). However, the complaint would not have passed the

[1] Petitioner's counsel are also counsel in three Columbia/HCA cases and have been provided all complaints as part of the MDL process.

Clausen standard. *See U.S. ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 206-07 (E.D. Tx. 1998) ("The defendants' pleas of the need for specific dates and invoice numbers for each transaction are not persuasive."). In 1997, SmithKline Beecham had the largest FCA settlement. 9 FCA QUARTERLY REVIEW 30 (1997) ($325 million). The complaint in that case could not have passed the *Clausen* standard.[2] *See e.g., U.S. ex rel. LaCorte v. SmithKline Beecham Clinical Lab.*, 149 F.3d 227, 235-36 (3d Cir. 1998) (quoting portions of the complaints alleging only that defendant "'*routinely billed* government health insurance programs for unordered blood tests . . . '" and "'[by] expanding and manipulating its test profiles, performing tests that are not medically necessary, and improperly billing for tests that should have been part of an automated test profile, [SmithKline] has *knowingly presented numerous false and fraudulent claims* for payment by the government.'" (emphasis added)). In 1996, LabCorp, itself, settled a case for $182 million – one of the largest at the time. *Top 1996 Qui Tam Recoveries*, 8 FCA QUARTERLY REVIEW 42 (1996). However, the complaint in that case could not have passed the *Clausen* standard.

Not only will *Clausen* push potential whistleblowers back to the shadows of silence, but it provides a nearly foolproof blueprint to defendants on how to reduce their potential exposure to prosecution. They simply need to make sure that no single employee has access to all the information required in *Clausen*, or that all suspicious employees are terminated before they can obtain such information. *See* Pet. at 8-10.

2. *Clausen*'s new Rule 9(b) is used to determine the merits of cases at the pleading stage rather than focus on

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[2] Petitioner Clausen was a party to the lawsuit and has access to the complaints. Petitioner's review is supported by pleading examples found in the Third Circuit's opinion.

notice pleading, thus wholly swallowing Rule 8 in contravention of the intent of the Rules and this Court's long-standing precedents. *See* discussion in Pet. at 10-17. The new Rule 9(b) is not restricted to whistleblowers or even FCA cases. Any plaintiff, including the Department of Justice, must abide by the new *Clausen* version of Rule 9(b) – requiring the particularized pleading of every element of a claim under the FCA or any other cause of action to which courts choose to apply Rule 9(b). The new Rule 9(b) requires an exactness in pleading not seen since the field code, creating a pleading minefield where one misstep results in dismissal with prejudice. *See* Pet. at 14-17 & n.4. This pleading "game of skill" was precisely what the Rules were intended to avoid, as was declared by this Court in *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). *See also* Pet. at 7-8, 12-13.

The new draconian version of Rule 9(b) not only eviscerates a very important national law (the FCA), but it will affect a veritable cornucopia of cases nationwide. The case of the billing clerk in Northern Alabama who was instructed how to defraud the government and watched fraudulent Medicare billing firsthand, but who was fired before copying any billing documents, would be dismissed as frivolous. The farmer from Southern Georgia who pleads that "on or about" a specific date, he paid a man he met at a bar for an investment in a company that did not exist will find his case summarily dismissed as meritless. The retiree from Southern Florida who was victimized by a RICO enterprise, but who is unable to ascertain, pre-discovery, all the particular details of each of the predicate acts will expeditiously lose with prejudice. Only a ruling by this Court can contain the potentially disastrous and widespread effects of the application of *Clausen*'s new Rule 9(b).

3. Requiring the pleading of evidence and refusing to accept the allegations as true undermines bedrock principles of the Rules and this Court's clear instructions. Pet. at 25-28. For the same reasons this Court granted certiorari

in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), and *Conley v. Gibson*, *supra*, it should grant this petition. This Court should protect the Rules and this Court's prior rulings from erosion and disregard.[3]

Allowing courts to use "heightened pleading" requirements to circumvent the edict that they must take the allegations as true will particularly affect the False Claims Act. In liberalizing the act in 1986, Congress expressly recognized that potential whistleblowers are very reluctant to come forward. S. Rep. at 4. A study reviewed by Congress showed that 69% of "those who believed they had direct knowledge of illegalities failed to report the information." *Id.* The number one reason given for failing to report fraud, waste and abuse was "the belief that nothing would be done to correct the activity even if reported." *Id.* at 5. It appears that Congress saw restrictive interpretations of the FCA, such as heightened proof requirements, as a reason for the belief that nothing would be done. *See id.* at 4. Allowing a judge to make a determination that, although a complaint provides sufficient

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[3] *Swierkiewicz* was unambiguous in requiring courts to avoid creating or expanding "heightened pleading" standards. *Swierkiewicz, supra*, at 514-15; *see also Leatherman, supra*, at 168. It appropriately instructed courts that claims lacking merit are to be dealt with on summary judgment and not at the pleading stage. *Swierkiewicz, supra* at 514; *see also Leatherman, supra*, at 168. In that *Clausen* and *Swierkiewicz* were decided in the same year, but *Clausen* completely failed to distinguish or even mention *Swierkiewicz* (or *Leatherman*), it appears that within only a few months, this Court's precedents were already being eroded. Because this Court meant for *Swierkiewicz* and *Leatherman* to be followed, it should grant the petition, vacate the *Clausen* decision and remand for an order consistent with this Court's precedents.

specificity to put defendant on notice, it is not sufficiently specific to be "believable", will prevent vast numbers of whistleblowers from coming forward and completely undermine the 1986 amendments and the FCA itself. If *Clausen* is not overturned, whistleblowers across the nation will go silent.

4. Potential whistleblowers, and others, will also be deterred by the one amendment rule. *See* Pet. at 28-30. Indeed, this "'one chance to amend'" policy is irreconcilable with the plain meaning of Rule 15 and this Court's longstanding precedent in *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). App. at 16 (quoting *Cooper, supra*, at 568-69).

Ignoring all other reasons for granting the petition, LabCorp's opposition is solely focused on the application of Rule 9(b) to FCA cases. First, as noted above, LabCorp argues that the Court should only take cases where there is a split of authority. Opp. at 2, 6. Second, LabCorp argues that the issue was not "fully and properly considered below." *Id.* at 8. Finally, LabCorp argues that Rule 9(b) should apply to all FCA cases because the FCA is an anti-fraud statute. *Id.* at 10.

LabCorp's argument that this Court should only grant petitions concerning splits of authority is addressed above. Moreover, it may actually support the petition if one takes into account the many "splits of authority" caused by *Clausen*'s new Rule 9(b) requirements, refusal to relax the new requirements, refusal to accept the facts as true, determination of the merits at the pleading stage, and refusal to allow amendments. *See* Pet. at 10-17, 25-30; *see also Ables v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001) (Rule 9 must not abrogate Rule 8); *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988) (same); *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1050-51 (7th Cir. 1998) (cited by *Rotella v. Wood,* 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) as an example of relaxing Rule 9(b)); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir.

1987) (same); *Club Protector Inc. v. J.G. Peta, Inc.*, 2002 U.S. App. Lexis 23385, slip op. at 3 (Fed. Cir. Nov. 8, 2002) ("We must accept as true all of the factual allegations in the complaint, make inferences from those allegations in the light most favorable to the plaintiffs, and liberally construe the complaint."); *Maple Lanes, Inc. v. Messer*, 186 F.3d 823, 824-25 (7th Cir. 1999) (same), *cert. denied,* 528 U.S. 1118 (2000); *White v. Walsh*, 649 F.2d 560, 562 (8th Cir. 1981) (courts do not review merits of case on motions to dismiss); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 998-99 (2002) ("Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56."); *Gulig v. Comm'r*, 293 F.3d 279, 281 (5th Cir. 2002) (leave to amend to be freely given); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002) (same).

LabCorp also argues that the Second Amended Complaint ("SAC") is "based upon allegations of intentional fraudulent misconduct" which would trigger an application of Rule 9(b) regardless of whether an FCA case for "negligence" might otherwise avoid it. Opp. at 7-8. In reality, the allegations of the SAC are co-extensive with the definition of "knowing" in the FCA, making it a perfect case for review. "*All of the conduct* alleged in the Amended Complaint is alleged to have occurred 'knowingly' as that term is defined in the [FCA], 31 U.S.C. § 3729(b)." SAC ¶ 19 (emphasis added).[4]

LabCorp argues that this is not a good case for review because the issue was not "fully and properly considered

[4] Although defendant notes that three paragraphs of the SAC use the phrase "fraudulently billed", the remainder (and vast majority) of similar references simply state that claims were submitted, billed or falsely submitted. *See e.g.*, SAC ¶¶ 52-62. Thus, consistent with the allegations of the SAC, petitioner could prevail without proving actual fraud. *See* SAC ¶¶ 72-75 (cause of action defined as "knowing" submission of false claims).

below." Opp. at 8. However, the direct opposite is true. App. at 15-18. The *Clausen* decision is actually the rare case that directly acknowledges that an FCA claim may be predicated on reckless disregard or deliberate ignorance, and yet applies Rule 9(b) to all FCA cases regardless of how they are pled. *Id.* Indeed, while other courts have applied Rule 9(b) without analysis or discussion, this case provides a particularly good vehicle for review principally because the issue was thoroughly discussed. *Compare LaCorte, supra*, at 234 (no analysis) *with* App. at 15-18.

In addition, as is clear from *Swierkiewicz* and *Leatherman*, the question of whether to apply Rule 9(b) to a statutory cause of action not expressly mentioned in Rule 9(b) can be determined through statutory interpretation irrespective of how the complaint is pled. *See Swierkiewicz, supra*, at 513; *Leatherman, supra*, at 168. Moreover, the Court in *Swierkiewicz* instructed that what is initially pled is not as important to a review as what could be proven after discovery. *Id.* at 511-12 ("Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard. . . . "). In other words, if discovery may allow a more lenient standard of proof, that is what should be used on review. *Id.* Here, discovery is not even necessary, because regardless of how an FCA complaint is drafted, the FCA does not require proof of fraud. *See* 31 U.S.C. § 3729(b); Pet. at 20-24. "It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits. . . . " *Swierkiewicz, supra*, at 511-12.

In the end, LabCorp adds nothing to *Clausen*'s analysis on applying Rule 9(b) to all FCA cases. *See* Opp. at 9-12; *but see* Pet. at 18-24 (addressing *Clausen*). However, LabCorp's argument highlights *Clausen*'s divergence from

this Court's analysis in *Swierkiewicz*. In essence, *Clausen* presumed that simply because one *could* plead fraud in support of an FCA case, Rule 9(b) should apply to all FCA cases. App. at 16-17. However, in *Swierkiewicz*, this Court assumed the opposite. Although a higher standard of proof was potentially applicable to the discrimination case before the Court, it analyzed the application of a heightened pleading standard based on the lesser proof that could have been available post-discovery. *Swierkiewicz, supra*, at 511-12. The lesser proof acknowledged by *Clausen* and LabCorp does not involve fraud. *See* Opp. at 11; App. at 17 n.15. Therefore, to apply Rule 9(b) to a cause of action that *expressly* does not require proof of fraud is to expand Rule 9(b) beyond what the unanimous Court in *Swierkiewicz* and *Leatherman* would allow.

Clausen indicates that Rule 9(b) should apply because Congress targeted fraud, making the FCA an "anti-fraud" statute. App. at 17; Opp. at 10-11. Rule 9(b) does not apply to statutes that target fraud or anti-fraud statutes. Rather it applies to averments of fraud. Pet. at 1. Congress may well have wanted to recuperate money lost due to fraud. However, Congress drafted a statute that did not require the pleading or proof of fraud. Pet. at 20-24.

Congress amended the FCA in 1986 to avoid restrictive court interpretations like the one espoused by *Clausen*. S. Rep. at 4. In fact, the legislative history of the amendments specifically differentiates the *design* of making "the Government whole for fraud losses" and the statutory *requirement* only "that the defendant knowingly submitted a false claim." *Id.* at 6-7. Congress then clarified that this had wrongly been construed by courts to require "actual knowledge of fraud" which "prohibits the filing of many civil actions to recover taxpayer funds lost to fraud." *Id.* at 7. In conjunction, Congress also addressed courts' erroneous requirements of heightened proof standards based on analogous criminal fraud statutes. *Id.* Congress changed the FCA to create the gross negligence standard

and to specifically exclude proof of fraud. 31 U.S.C. § 3729(b).

Because Congress took the old law (prior restrictive FCA interpretations) and rectified the mischief (heightened standards of proof) by expressly stating that fraud was not a necessary element of proof under the FCA (the remedy), *Clausen* stands the doctrine of the old law, the mischief and the remedy on its head in applying Rule 9(b) to FCA cases. *See United States v. St. Paul, M. & M. R. Co.*, 247 U.S. 310, 318, 38 S.Ct. 525 (1918).

Respectfully submitted,

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